App. 1

[Filed May 2, 1995—Pub. in Full]

No. 2-94-0839

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs-Appellants and
Counterdefendants and
Cross-Appellees,

v.

MARY E. HOGAN, SAM LOIACONO, and RUTH LOIACONO,

Defendants-Appellees and
Counterplaintiffs and
Third-Party Plaintiffs
and Cross-Appellants

(Cole Taylor Bank, as Trustee under Trust No. 77-432, Dated December 19, 1977, and Unkown Owners, Defendants-Appellees and Cross-Appellants; Lake Barrington Industrial Park Association, Counterplaintiff and Third-Party Plaintiff and Cross-Appellant; Nancy Smith and James Bateman, Third-Party Defendants and Cross-Appellees).

Appeal from the Circuit Court of Lake County.
No. 93-MR-11
Honorable William D. Block, Judge, Presiding.

JUSTICE THOMAS delivered the opinion of the court:

The plaintiffs, the Village of Lake Barrington and the Village of Lake Barrington Special Service Area Number

Three (collectively the Village), filed a three-count amended complaint against the defendants, Mary E. Hogan, Sam Loiacono and Ruth Loiacono. Count I of the Village's amended complaint sought a declaration that the ordinances it adopted creating a special service area were valid. Count II of the amended complaint alleged that the defendants tortiously interfered with the Village's contract with the company that was to provide the bonding for the project. Count III of the amended complaint alleged that the defendants tortiously interfered with the Village's economic advantage. Pursuant to section 1983 of the Civil Rights Act (42 U.S.C. 1983 (1992), the defendants brought a two-count counterclaim against the plaintiffs and a third-party complaint against third-party defendants James Bateman and Nancy Smith. The defendants also brought a counterclaim seeking a declaration that the Village ordinances creating the special service area were invalid. The Village appeals from the trial court's summary judgment order finding that the ordinances creating the special service area were not validly enacted. The Village and Bateman appeal the trial court's order imposing sanctions against them pursuant to Supreme Court Rule 137 (134 Ill. 2d R. 137). The defendants appeal the trial court's dismissal of their counterclaims.

The pleadings, exhibits, and affidavits on file reveal that in December 1990, John Reindl was hired by the Village to coordinate the creation and implementation of a special service area in a location known as the Lake Barrington Industrial Park (Park). The Village adopted its first ordinance with respect to the project on July 7, 1992, which established a public hearing date of July 29, 1992. The Village then attempted to satisfy the statutory

notice requirements. Notice of the hearing was published in the Daily Herald on July 13, 1992.

According to Reindl's affidavit, he mailed notices to the person or persons in whose names the general taxes for the preceding year had been paid. He based his decision of who should receive notice on information appearing in duplicate tax receipts. He explained that when he sent the notices he was unaware this information was not as comprehensive as the actual tax bills and that the names of some individuals on behalf of whom taxes were also paid were left out. The notices were sent by first-class mail and also by certified mail.

Defendant Ruth Loiacono, one of two persons in whose names the taxes had been paid for a single parcel of land in the special service area, was not mailed a notice. A notice was signed for by her husband, defendant Sam Loiacono. Phyllis Pynsky, Mildred Drasen, and Margaret Malo were also not mailed notices, but they are not parties to this action.

After the public hearing was adjourned on July 29, 1992, defendants Mary Hogan, Sam Loiacono, and Ruth Loiacono filed objections to the service area. However, the total number of objections filed was less than the 51% required by statute to prevent the creation of the special service area, the levy of taxes, and the sale of bonds. Specifically, two of the five registered voters signed objections, and 46 out of 127 owners of record filed objections.

Thereafter, the Village adopted an ordinance establishing the special service area. The area consisted of 100 separate parcels and 127 owners of record. It also adopted an ordinance which provided for the levy of

taxes and the sale of bonds in the aggregate amount of $7 million. The Village then entered into an agreement with Bernardi Securities, Inc., for the sale of the bonds.

According to the Village's amended complaint, Village attorney James Bateman had a series of communications with attorney James Hecht, who represented defendant Mary Hogan. Hecht had attended a Village Board meeting, at which time he had raised certain legal objections to the establishment of the special service area. Bateman had a conversation with Hecht on November 12, 1992, in which Bateman disclosed to Hecht that the bond ordinance would be adopted very soon and that Hecht should conclude his review as soon as possible. On December 3, 1992, Hecht told Bateman in a telephone conversation that he was preparing a suit to enjoin the sale of the bonds. On December 9, 1992, in another telephone conversation, Bateman informed Hecht that his threat of litigation was holding up on the bond sale closing, which had been sent for December 14, 1992. According to the Village's amended complaint, Hecht's threat of litigation prevented the Village from closing on the bonds on December 14, 1992. On December 18, 1992, Bateman spoke on the telephone once more with Hecht, who was told that his threat of litigation was interfering with the ability of the Village to close on the sale of the bonds, since the Village could not represent to bond counsel that there was no pending or threatened litigation. In that conversation, Hecht denied that the had threatened litigation. Bateman then sent a letter to Hecht on December 21, 1992, to confirm this statement.

On December 22, 1992, Bateman had another telephone conversation with Hecht, in which Hecht refused to confirm his earlier denial that the defendants had

threatened or were threatening suit and stated that he "did not like how this matter was going." Hecht's subsequent letter to Bateman of December 22, 1992, recited certain defects in the special service area proceedings.

The sale of the bonds never closed. The Village contends that the closing was prevented by the persistent threat of litigation by Hecht on behalf of defendant Mary Hogan and certain other undisclosed clients of Hecht.

According to the defendants' counterclaim, Hecht advised Bateman sometime prior to December 9, 1992, that a suit would be filed to contest the validity of the ordinances creating the special service area. Thereafter, Bateman met with Village president Nancy Smith, and the two agreed that the defendants should be dissuaded from filing a lawsuit. Notwithstanding the defendants' constitutional rights to challenge the validity of the ordinances, Bateman advised Hecht sometime before December 7, 1992, that if Hecht's clients sought a judicial determination of the validity of the ordinances, the Village would file an action for damages against his clients. At that point, Hecht's clients advised him not to file suit in view of the Village's threat to sue them for $6 million in damages.

Thereafter, Bateman repeatedly attempted to ascertain the identify of Hecht's clients so that he could file suit against them on behalf of the Village. On January 5, 1993, the Village and Bateman carried out their threats and filed suit against the defendants, alleging in essence that the defendants were liable in tort for having considered to seek a judicial determination with respect to the validity of the ordinances.

[The following material is nonpublishable under Supreme Court Rule 23.]

On January 5, 1993, the Village filed a two-count complaint against defendants Mary Hogan, Sam Loiacono, and Ruth Loiacono seeking a declaration of the validity of the special service area ordinances, as well as money damages for tortious interference with contract. The complaint was dismissed by the trial court, but the Village was granted leave to file an amended complaint, which it filed on March 22, 1993.

On April 15, 1993, the defendants filed a counterclaim against the Village and a third-party complaint against third-party defendants James Bateman and Nancy Smith. Counts I and II were brought pursuant to section 1983 of the Civil Rights Act and alleged that the Village's and third-party defendants' conduct violated the defendants' constitutional right to petition the court for a redress of grievances.

On April 21, 1993, the trial court dismissed with prejudice Count II, the tortious interference with contract claim, and Count III, the tortious interference with prospective economic advantage claim of the Village's amended complaint.

The defendants filed a counterclaim on July 26, 1993, in which they sought a declaration that the special service area ordinances were invalid. They filed their first amended counterclaim and third-party complaint on July 28, 1993. The theories of Counts I and II remained the same, first amendment and equal protection claims for damages. The Village filed a motion to dismiss the amended counterclaim, as did the third-party defendant, James Bateman.

On November 22, 1993, the Village filed its motion for partial summary judgment as to Count I of its amended complaint (declaratory judgment) and defendants' counterclaim for declaratory judgment.

The trial court dismissed with prejudice Count I (first amendment) of the first amended counterclaim. The defendants filed a cross-motion for summary judgment.

On March 30, 1994, the trial court ruled on the cross-motions for summary judgment, finding that the notice mailed by the Village did not satisfy the statute for service upon individual owners and also that the notice was insufficient in content. On that same day, the trial court denied Count I of the defendants' counterclaim, but did not rule on Count II of that claim. On May 4, 1994, the court granted the Village's summary judgment motion to dismiss Count II of the defendants' counterclaim.

On May 16, 1994, the Village filed a motion to reconsider asking the court to reverse its summary judgment order of March 30, 1994. The Village filed a notice of appeal on July 18, 1994.

On July 27, 1994, the defendants filed a Supreme Court Rule 137 motion for sanctions against the Village and attorney Bateman alleging that the tortious interference counts filed by the Village were not warranted by existing law and were filed for an improper purpose. The trial court granted the motion on August 11, 1994, finding that the Village filed the claim for the sole purpose of intimidating the defendants and that it was without any reasonable basis in law.

On August 16, 1994, the trial court entered an order denying a motion filed by the defendants for *nunc pro tunc* revision of the court's order of May 4, 1994. In that

motion, the defendants had requested that the court delete language from the order stating that there was no just reason to delay enforcement or appeal. The trial court denied the motion, but in so doing the court found that the language in question was merely surplusage, because at the time the May 4 order was entered, it was a final order. On August 17, 1994, the Village and James Bateman filed their supplemental notice of appeal, and the defendants filed their cross-appeal.

Initially, we note that the defendants have filed a motion requesting that we strike a portion of the Village's appeal brief and enter sanctions against the Village for raising a meritless argument regarding the timeliness of the defendants' cross-appeal. The Village has filed a response to that motion and a cross-motion to dismiss the defendants' cross-appeal.

The Village argues that the defendants' cross-appeal should be dismissed because it was not timely filed, and the July 27, 1994, motion for sanctions did not toll the time within which to file the cross-appeal. We disagree.

In *Gaynor v. Walsh* (1991), 219 Ill. App. 3d 996, a motion for sanctions was filed 25 days after the trial court's disposition of the last post-trial motion and five days after the other party had filed a notice of appeal. The court held that a Rule 137 motion for sanctions may be filed at any time during which the trial court has jurisdiction, which extends 30 days past the date the last order or judgment (which includes an order denying a post-trial motion) was issued in the case. (*Gaynor*, 219 Ill. App. 3d at 1002.) Moreover, the *Gaynor* court noted that the plaintiff's notice of appeal did not divest the trial court of jurisdiction to consider the defendant's later filed motion for sanctions. In fact, the court held that the

plaintiff's notice of appeal was rendered premature by the filing of the motion for sanctions.

In the instant case, the trial court's May 4, 1994, order was a final order under Supreme Court Rule 301 (134 Ill. 2d R. 301) because it disposed of all the claims in the case at the time it was entered. The trial court's July 18, 1994, order merely clarified that summary judgment had in fact been entered on March 30, 1994, with respect to the cross-motion for summary judgment on the validity of the ordinances. The final order entered on May 4, 1994, disposing of all the claims remaining in the case, was not rendered an order subject to Supreme Court Rule 304(a) (134 Ill. 2d R. 304(a)) merely because it contained Rule 304(a) language providing that there was "no just reason to delay enforcement or appeal."

Thus, the parties had 30 days from May 4, 1994, to file a notice of appeal or a post-trial motion. The Village filed a timely post-trial motion on May 16, 1994. That post-trial motion was denied on June 29, 1994. The defendants' motion for sanctions which was filed on July 27, 1994, within 30 days of the denial of the post-trial motion, was timely and rendered the Village's notice of appeal premature. The trial court granted the defendants' motion for sanctions on August 11, 1994. Therefore, the defendants' cross-appeal and the Village's supplemental notice of appeal filed on August 17, 1994, were timely, as the appeals were filed within 30 days of the court's sanction order. While we find that the Village's argument on this issue substantially lacked merit, we decline to impose sanctions against the Village under Supreme Court Rule 375(b) (134 Ill. 2d R. 375(b)).

[The preceding material is nonpublishable under Supreme Court Rule 23.]

The Village first argues on appeal that the trial court erred in finding that the Village did not satisfy the statutory notice requirements. The Village contends that it was only required to comply substantially with notice requirements, while the defendants claim that strict compliance was necessary.

Section 5 of the Special Service Area Tax Act (the Act) provides that notice of the hearing regarding the establishment of a special service area shall be given by publication in a newspaper of general circulation in the county and by mailing. (35 ILCS 235/5 (West 1992).) Section 5 further provides:

> "Notice by mailing *shall* be given by depositing said notice in the United States Mail *addressed to the person or persons in whose name the general taxes for the last proceeding year were paid* on each lot *** within the special service area. *** In the event taxes for the last preceding year were not paid, the notice shall be sent to the person last listed on the tax rolls prior to that year as the owner of said property." (Emphasis added.) 35 ILCS 235/5 (West 1992).

In *Andrews v. County of Madison* (1977), 54 Ill. App. 3d 343, the court had an opportunity to construe the notice requirements of section 5 of the Act. There, the plaintiffs brought an action to enjoin the county from taking any action in furtherance of its ordinance creating a special service area and providing for the financing of services in connection with the area. Among other things, the plaintiffs argued that the county failed to satisfy the notice requirements of section 5. The *Andrews* court held that the county substantially complied with the notice requirements even though some owners did not receive actual mail notice because the county sent some notices

to mortgagees without any cross-reference to the actual owners of record.

In *Grais v. City of Chicago* (1992), 151 Ill. 2d 197, our supreme court addressed the notice requirement of section 5 of the Act. There, notice was sent only to owners of commercial property within the special service area and not to owners of residential property. The court noted that the lack of notice was problematic because the statute requires that taxpayers be mailed individual notice before their property can be included within a special service area. However, the plaintiff in *Grais* did not claim that he did not receive notice. The court found that it could not invalidate the entire special service area based on a lack of notice to some owners. The court further stated that any taxpayer who is eventually taxed may have an individual dispute with the city if notice was not provided to him or to his predecessor-in-interest.

Applying *Grais* to the present case, we find that the clear import of the decision is that notice under the statute is not jurisdictional and the lack of notice to some taxpayers within the special service area does not invalidate the entire service area. However, we hold that the reasoning of *Grais* further requires that the Loiacono parcel be excluded from the special service area since Ruth Loiacono did not receive mail notice and she is a party to the instant proceeding. To the extent that *Andrews* is inconsistent with *Grais* and our holding on this issue, we decline to follow *Andrews*.

The Village next argues that the trial court erred in finding that the content of the notice sent by the Village did not satisfy the statutory criteria. The trial court did not specifically mention any particular defect in the notice to support its finding. However, the defendants

alleged the following deficiencies in the notice: (1) that in addition to stating that the purpose of the hearing was to consider the special service area; (2) that the notice did not state that interested persons could object to the formation of the area first and then have a further opportunity to object to the levy and issuance of bonds; (3) that the notice failed to advise interested persons that they could file objections regarding any issue appearing in the notice; (4) that it did not mention that the defendants could object to the issuance of bonds; and (5) that it did not state that interested persons would have an opportunity to file an objection *at the hearing*.

Initially, we note that to determine whether a statute is mandatory or discretionary, courts look first to the language of the statute as the best indication of legislative intent. (*Pullen v. Mulligan* (1990), 138 Ill. 2d 21, 65; *People ex rel. Village of Grayslake v. Village of Round Lake Beach* (1993), 242 Ill. App. 3d 750, 756.) If a statute imposes duties and by express language provides that the omission to perform the duties renders the proceeding void, then courts are bound to construe those provisions as mandatory. In most cases, however, the statute simply provides that certain acts shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the proceeding; in these cases, the statute is directory. *People ex rel. Village of Grayslake*, 242 Ill. App. 3d at 756.

Applying the above-mentioned principles, we find that the statutory criteria regarding the content of the notice is directory and not mandatory. The statute does not provide that compliance with every detail of the content-of-notice provisions is essential to the validity of the pro-

ceeding. More importantly, we find that the Village complied with the notice requirements of the statute. The first and fourth of the purported deficiencies listed above are belied by the notice itself. Regarding the second alleged deficiency, we note that the requirement suggested by the defendants is not mandated by statute. Thus, we will not require it either since more specificity is not required by the statute. (See *Schwarzbach v. City of Highland Park)* (1980), 82 Ill. App 3d 807.) Lastly, we note that section 4(3) of the Act does not require notice of opportunity to file objections *at the hearing*. Rather, that section states only that the notice provide interested persons have an opportunity to file objections to the amount of the tax levy. Section 9 of the Act (35 ILCS 235/9 (West 1992)) does not require a different result. It does not require, as the defendants urge, that the Village ascertain and disclose the owners of record at the public hearing. Rather, its purpose is to provide a date for determining owners of record with respect to objectors' petitions. See 35 ILCS 235/9 (West 1992).

The Village next argues that the trial court erred in finding that Counts II and III of its amended complaint failed to state a cause of action. Specifically, the Village contends that the court erred in finding that defendants' conduct was conditionally privileged, because the privilege only applies to an attorney representing a client's interests. Count II of the amended complaint alleged that the defendants tortiously interfered with the Village's contract with Bernardi Securities, Inc., for the sale of the bonds to finance the improvements to the special service area. Count II alleged that the defendants tortiously interfered with the Village's economic advantage.

A trial court should dismiss a complaint for failure to state a cause of action only if it is clear that no set of facts can be proved which will entitle the plaintiff to recover. (*People ex rel. Daley v. Datacom Systems Corp.* (1991), 146 Ill. 2d 1, 11.) In assessing the sufficiency of the complaint, we must take as true all well-pleaded facts and reasonable inferences drawn from those facts. *Weinberger v. Bell Federal Savings & Loan Association* (1994), 262 Ill. App. 3d 1047, 1049-50.

It is well settled that Illinois courts will recognize a privilege in intentional interference with contract cases where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights. (*HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.* (1989), 131 Ill. 2d 145, 157.) It is axiomatic that acts involving the first amendment right to petition the government for redress of grievances involve an interest protected by the privilege. (*Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Association* (1967), 37 Ill. 2d 546, 550; *Mannion v. Stallings & Co.* (1990), 204 Ill. App. 3d 179, 189.) Where the conduct of the defendant appears to be privileged from the fact of the plaintiff's complaint, the plaintiff is required to plead and prove that the defendant's actions were done without justification. (*HPI Health Care*, 131 Ill. 2d at 156; *Arlington Heights National Bank*, 37 Ill. 3d at 551; *Mannion*, 204 Ill. App. 3d 179.) To state properly a cause of action for intentional interference with contractual rights, a plaintiff must state more than a mere assertion that the defendant's conduct was justified. *HPI Health Care*, 131 Ill. 2d at 158.) Furthermore, ill-will alone is not enough to establish lack of "justification"; there must be a desire to

harm, which is independent of and unrelated to a desire to protect the acting party's rights and which is not reasonably related to the defence of a recognized property or social interest. *Arlington Heights National Bank*, 37 Ill. 2d at 551.

Examining Counts II and III of the Village's amended complaint, it is clear that the counts were based on the defendants' actions of hiring an attorney to protect their property rights with respect to the imposition of the special service area. The complaint alleges that the defendants' attorney raised questions with respect to the validity of the ordinances and threatened litigation. This simply indicates that the defendants were exercising their first amendment rights to petition government for a redress of grievances. They were also attempting to protect their property interests. We find that under the circumstances of the case the defendants enjoyed a conditional privilege. The Village's insistence that only the defendants' attorney's conduct was privileged and not the conduct of the defendants is wholly without merit and is an exercise in faulty syllogism. Moreover, we find that the plaintiff failed to allege facts indicating that the defendants' conduct was unjustified. Additionally, we note that given the circumstances it is clear that the plaintiffs could prove no set of facts which would entitle them to recover. Accordingly, the trial court properly dismissed with prejudice Counts II and III of the Village's amended complaint.

Next, the Village and attorney Bateman argue that the trial court erroneously imposed sanctions against them pursuant to Supreme Court Rule 137 (134 Ill. 2d R. 137). They content that the tort claims in Counts II and III of the Village's amended complaint were filed in good faith and not for an improper purpose. We disagree.

Supreme Court Rule 137 provides in relevant part:

> "The signature of an attorney or party [on a pleading] constitutes a certificate by him that he has read the pleading *** that to the best of his knowledge, information, and belief formed after reasonable inquiry it is *** warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading *** is signed in violation of this rule, the court *** may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties in the amount of reasonable expenses incurred because of the filing of the pleading." (134 Ill. 2d R. 137)

The purpose of Rule 137 is to penalize litigants who plead frivolous or false matters or bring suit without any basis in law. (*In re Marriage of Sykes* (1992), 231 Ill. App. 3d 940, 946). The test to be utilized in determining whether a violation has occurred is an objective standard of what was reasonable under the circumstances at the time the assertions were made. (*Lewy v. Koeckritz International, Inc.* (1991), 211 Ill. App. 3d 330, 334.) A trial court's decision to impose sanctions under the rule will not be disturbed absent an abuse of discretion, and an abuse of discretion will be found only where a trial court has made a decision no reasonable person could make. *In re Marriage of Sykes* (1992), 231 Ill. App. 3d 940, 946.

Here, the trial court stated in its written sanction order that Counts II and III were without any reasonable basis in law and did not represent a good-faith argument for the extension or modification of existing law. The

court further found that the claims were not filed for any legitimate purpose other than to intimidate the defendants into withdrawing their objections to the special service area. We find that the court's conclusions were supported by the facts of this case. As stated previously, the Village's argument that the conditional privilege only applied to attorneys was without merit and did not represent a good-faith argument for the modification of existing law. Accordingly, we are unable to say that no reasonable trial judge would have imposed sanctions in this case.

We will now address the defendants' cross-appeal. Count I of the defendants' amended counterclaim alleged that the Village, attorney Bateman, and Village president Nancy Smith violated section 1983 of the Federal Civil Rights Act, in that they attempted to deter the defendants from seeking a judicial determination of the validity of the ordinances. The defendants first argue that the trial court erred in dismissing Count I of their amended counterclaim on the basis that it was barred by the Noerr-Pennington doctrine. The defendants further argue that even if the Noerr-Pennington doctrine is initially applicable, the Village's conduct in filing its action for tort damages fell under the "sham" exception to the doctrine and was thus actionable pursuant to section 1983.

The essence of the Noerr-Pennington doctrine is that parties who petition the government for governmental action favorable to themselves cannot be sued under the Sherman Anti-trust Act, even though their actions are motivated by anti-competitive intent. (*United Mine Workers of America v. Pennington* (1965), 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585, 1593.) This doctrine has

been extended to local governmental bodies to immunize them from suit. (*Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority* (D.N.J. 1989), 715 F. Supp. 1290, 1301-03.) Courts, however, have carved out an exception to the doctrine for "sham" litigation. (*Bill Johnson's Restaurants, Inc. v. NLRB* (1983), 461 U.S. 731, 740, 76 L. Ed. 2d 277, 286, 103 S. Ct. 2161, 2168; *California Motor Transports Co. v. Trucking Unlimited*, (1972), 404 U.S. 508, 513, 30 L. Ed. 2d 642, 646, 92 S. Ct. 609, 613; *Harrison v. Springdale Water & Sewer Comm'n* (8th Cir. 1986), 780 F. 2d 1422, 1428.) To constitute "sham" litigation a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. ___, ___, 123 L. Ed. 2d 611, 624, 113 S. Ct. 1920, 1928.

Here, the Village urges that the "sham" exception does not apply because this case does not involve any massive activities as in *California Motor Transport Co.* or repetitive lawsuits carrying the hallmark of insubstantial claims as in *Otter Tail Power Co. v. United States* (1973), 410 U.S. 366, 380, 35 L. Ed. 2d 359, 93 S. Ct. 1022, 1031. The Village also contends the exception is not applicable because the defendants were not eventually denied access to the courts.

The Village's arguments are erroneous. A single baseless suit is sufficient to invoke the sham exception. (*Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.* (9th Cir. 1982), 690 F. 2d 1240, 1254-57; *USS-Posco Industries v. Contra Costa County Building & Construction Trades Council* (9th Cir. 1944), 31 F. 3d 800, 810-11.) Furthermore, a litigant need not prove that he was

actually barred from access to the courts as a prerequisite to maintaining an action with the aid of the "sham" exception to the Noeer-Pennington doctrine. (*Clipper Express*, 690 F. 2d at 1257-59; *Harrison*, 780 F.2d 161, 163.

The Village argues that the "sham" exception should not apply because the declaratory judgment action was not a sham and the tort claims were not clearly barred by the conditional privilege. The Village's arguments must be rejected. It cites no authority for the proposition that it could file sham litigation as long as one of several counts in the complaint had merit. Regarding the issue of whether the tort claims were clearly barred by the conditional privilege, we have already touched on that contention with our finding that the trial court correctly imposed sanctions for the filing of a baseless lawsuit. Taking the well-pleaded facts of the defendants' amended counterclaim as true, we find a trier of fact could conclude that the defendants were entitled to recover damages. Accordingly, Count I of the defendants' amended counterclaim should not have been dismissed.

Third-party defendants Bateman and Smith contend that they enjoyed qualified immunity from suit as public officials.

Governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutes or constitutional rights of which a reasonable person would have known. (*Harlow v. Fitzgerald* (1982), 475 U.S. 800, 801, 73 L. Ed. 2d 396, 400, 102 S. Ct. 2727, 2729.) This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawful-

ness must be apparent. (*Anderson v. Creighton* (1987), 483 U.S. 635, 640, 97 L. Ed. 2d 523, 531, 107 S. Ct. 3034, 3039.) In essence, the immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* (1986), 475 U.S. 335, 341, 89 L. Ed. 2d 271, 278, 106 S. Ct. 1092, 1096.

Applying these standards we find that a reasonable village president would have relied on the advice of the Village attorney that the course of conduct the Village was pursuing was proper and legal, and thus we find immunity applies to Smith. However, we find that in light of the preexisting law the immunity does not extend to attorney Bateman. Thus, we conclude that the trial court properly dismissed Count I of the defendants' counterclaim as it pertained to Smith, but erred in dismissing that claim as it pertained to Bateman.

The defendants next argue that the court erred in dismissing Count II of their amended counterclaim. Count II alleged that the Village violated principles of equal protection by intentionally gerrymandering the special service area to exclude owners and electors who were opposed to the project. The defendants further argue that the special service area was not needed and did not rationally relate to a legitimate purpose.

In support of its claim, the defendants presented the affidavit of Bruce Walterman. Walterman's affidavit revealed that he expressed his opposition to the special service area and thereafter his property was excluded. The defendants claim that he was excluded because he voiced his opposition and that this was improper.

We find that the trial court properly dismissed the defendants' claim. Section 6 of the Special Service Area

Tax Act specifically provides that a municipality may delete property from the special service area as long as the area remains contiguous after the deletion. (35 ILCS 235/6 (West 1992).) Here, the defendants do not argue that the area after the deletion of Walterman's property was not contiguous. Moreover, the Village explained that the special service area was designed to benefit the industrial park. The Village noted that Walterman's property was not strictly commercial since he lived on the property, and it was excluded for that reason. Regarding the defendants' claim that the special service area was not necessary or legitimate, we note that the evidence that the improvements would enhance the ability to fight fires within the district was unrebutted. Under these facts, we find that there was no issue of material fact with regard to a possible violation of the equal protection clause. Accordingly, we find that the trial court properly dismissed the plaintiffs' equal protection claim.

For the foregoing reasons, we reverse the trial court's order declaring the entire special service area to be invalid. However, we order that the Loiacono parcel be excluded for lack of notice. We affirm the trial court's order dismissing the Village's tort claims, Counts II and III of its amended complaint. We also affirm the trial court's order of Rule 137 sanctions against the Village and attorney Bateman. Regarding the defendants' cross-appeal, we reverse the trial court's order dismissing Count I of the defendants' counterclaim and third-party complaint and remand the cause for further proceedings, but affirm the order with respect to the dismissal of third-party defendant Smith. We also affirm the trial court's order dismissing Count II of the defendants' amended counterclaim.

The judgment of the Circuit Court of Lake County is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

RATHJE AND HUTCHINSON, JJ., concur.

ILLINOIS APPELLATE COURT
Appellate Court Building
Elgin, IL 60120

June 9, 1995

No. 93MR11

The Village of Lake Barrington et al., etc.,

Respondents

vs.

Mary E. Hogan, et al.,

Petitioners

Appeal from the Circuit Court
of County of Lake

ORDER

Upon consideration of the Petitions for Rehearing filed May 23, 1995, the Petitions for Rehearing are hereby denied.

(Thomas, Rathje, Hutchinson, JJ.)

ILLINOIS SUPREME COURT
Supreme Court Building
Springfield, IL 62706

October 4, 1995

No. 79405

The Village of Lake Barrington et al., etc.,

Respondents

vs.

Mary E. Hogan, et al.,

Petitioners

Appeal from the Illinois Appellate Court
Second Judicial District

ORDER

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

IN THE ILLINOIS CIRCUIT COURT
FOR THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS
CHANCERY DIVISION

[Dated March 30, 1994]

VILLAGE OF LAKE BARRINGTON, et al., etc.	)	
Respondents	)	
vs.	)	No. 93 MR 11
MARY E. HOGAN, et al.	)	
Petitioners	)	

SUMMARY JUDGMENT

This matter before the Court upon cross motions of **SUMMARY JUDGMENT**, due notice having been given, briefs having been filed, oral argument having been heard, with the Court being fully advised in the premises, it is hereby ordered:

1) The Court finds that there are no genuine issues of material fact to be tried by the Court;
2) The Court finds as a matter of law that no gerrymandering of the SSA Boundaries occurred;
3) As a matter of law, the SSA is not irrational;
4) As a matter of law, the **NOTICE** did not meet the statutory requirements for service upon individual property owners and was legally insufficient in content;

5) The bench trial date of May 31, 1994 is hereby stricken;

6) The **MOTION FOR SUMMARY JUDGMENT** with respect to Count II of the Counterclaim is hereby stricken;

7) Upon a waiver of notice and stipulation, the **SUMMARY JUDGMENT MOTION** with respect to Count II is hereby entered; Counter-Plaintiffs shall have 28 days to respond;

This matter is set for oral argument on May 4, 1994 at 9:00 a.m. without further notice.

S/S: William D. Block
Judge William D. Block

DATE: March 30, 1994